STATE OF MICHIGAN

COURT OF APPEALS

TODD L. GRUBB,

Plaintiff-Appellant,

v

JILL N. GRUBB,

Defendant-Appellee.

UNPUBLISHED
August 31, 1999

No. 217622
Kalamazoo Circuit Court
Family Division
LC No. 97-001213 DM

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from a judgment of divorce. We affirm.

I. Basic Facts And Procedural History

Plaintiff in this matter, Todd L. Grubb, had been married once before the marriage to defendant, Jill N. Grubb, that is the subject of this appeal. Plaintiff and his first wife, Trace Clemens, had one child together who, at the time of trial, was eight years old. In 1989, plaintiff and Clemens bought a house in Galesburg, for which the purchase price was $46,000. The down payment on the house was $4,600 and plaintiff's parents gave plaintiff the money for the down payment. Although plaintiff and his parents claimed at trial that the money was a loan, which was to be repaid when plaintiff sold the house,[1] there was evidence presented at trial to indicate that the down payment was a gift from plaintiff's parents to plaintiff and Clemens.[2] In 1991, plaintiff initiated divorce proceedings against Clemens and the divorce was final in 1992. In the divorce, plaintiff was awarded the Galesburg house which, at that time, was valued at $47,000.

Subsequently, in mid- to late 1993, plaintiff began dating defendant and the parties were married in September 1994; the parties' only child, Austin Grubb, was born in July 1994. After the wedding, defendant and the child moved into plaintiff's house in Galesburg.

During the marriage, plaintiff worked at Green Bay Packaging, earning approximately $12.70 per hour. Defendant operated a day care business out of the parties' home. In 1994, defendant earned

$16,700 and in 1995, she earned $9,800. On the other hand, plaintiff earned approximately $47,000 per year in 1996. At the time of trial, plaintiff was earning $12.70 per hour and defendant was earning approximately $110 per week. Defendant indicated that she was only providing daycare for two children but that she planned to increase the number of children for whom she cared.

The parties made certain improvements[3] to the residence during the marriage,[4] and plaintiff admitted that defendant contributed financially to improving the house. The parties pooled their incomes into a joint account and made the mortgage payments and residential improvements out of that account. During the marriage, the parties also made extra mortgage payments in an effort to "pay the mortgage down." At the time of trial, plaintiff's expert indicated that the marital residence was worth $57,000 or $58,000 while defendant's expert appraised the marital home at $68,000. There was approximately $35,400 owing on the mortgage. The parties had no other major assets.

At trial, there was essentially no dispute that defendant was Austin Grubb's primary caretaker during the marriage. Not only did defendant care for the child, but she also took care of plaintiff's daughter from his prior marriage. Defendant testified that plaintiff worked a lot of overtime during the marriage and "didn't really interact with the family," testimony that plaintiff did not contradict. Moreover, defendant's testimony was supported by the testimony of her mother, Joyce Mussulman. Mussulman testified that plaintiff spent very little time with the children when he was married to defendant. Defendant testified that plaintiff rarely performed any caretaking functions. For instance, he did not prepare meals for the children or take them shopping. Plaintiff, however, described himself as an "awesome" father.

Plaintiff filed for divorce from defendant in early May 1997. Approximately one week after these divorce proceedings were initiated, defendant took Austin Grubb and her child from a previous relationship and moved into her recently deceased grandmother's house. Defendant and the children lived in her grandmother's house for approximately six months and then moved to a two-bedroom apartment.

During the pendency of this matter, plaintiff, apparently with financial assistance from his parents, hired a private investigator to follow defendant. Plaintiff admitted that his parents drove by defendant's house to check-up on her but only because "they are concerned grandparents."

In early June 1997, an order was entered which awarded temporary custody of Austin Grubb to defendant and allowed plaintiff to have visitation with Austin Grubb. At trial, plaintiff sought joint physical custody of Austin Grubb. A custody evaluation was conducted by psychologist Thomas Lanning. Dr. Lanning's recommendation was that the parties share joint legal custody of Austin Grubb but that defendant be awarded primary physical custody.

After hearing the above evidence, the trial court made the following findings of fact and conclusions of law:

CUSTODY, VISITATION AND CHILD SUPPORT

Pursuant to the court's temporary order dated June 9, 1997, defendant has custody of the minor child and plaintiff has had parenting time. An established custodial environment exists if, over an appreciable period of time, the child naturally looks to a party for parental support including emotional and financial support. Pursuant to that standard, the established custodial environment for Austin is with the defendant. Therefore, in order for the court to change custody the plaintiff must prove by clear and convincing evidence that a change is warranted.

Considering the evidence presented, the court concludes that the plaintiff has not presented clear and convincing evidence that a change of custody is warranted. Custody will therefore remain with the defendant.

In making the determination as to custody, the court has considered the criteria in Michigan Child Custody Act, M.C.L. 722.223, and finds as follows:

(1) Love, affection and other emotional ties exist between both parties and their child.

(2) Both parties have the capacity and disposition to give the child love, affection and guidance and the continuation of the educating and raising of the child in a religion. Both parties have a religious affiliation. Their inability to agree on religious practices and traditions satisfactory to both of them was one of the contributing factors to a breakdown; however, that does not take away from the fact that both parties have regular religious practices.

(3) Both parties can provide food, clothing and medical care and other remedial care for the child.

(4) The child has lived with the defendant in a stable and satisfactory environment as noted above, and it is desirable to maintain this continuity for the sake of stability.

(5) Both parties experience stable family units.

(6) Both parties are morally fit.

(7) Both parties are mentally and physically healthy.

(8) The child, as noted, has lived with his mother, and she has been his regular care giver for an extended period of time.

(9) The child is too young to express a preference himself.

(10) Both parties have reasonably civil attitudes towards one another. A deciding difference in this area, however, is the plaintiff's either inability or unwillingness

to choose his own family unit over the family unit of himself and his parents. His parents, according to the evidence, appear to be very well-intentioned and sincere people; however, they have become an interference with the relationship of the parties to this marriage, and the plaintiff's inability to deal with that interference has contributed to the breakdown of the marriage. That same inability has caused difficulty in the raising of the child and subjected the child to contradictions and confusing messages between the parties. Because of it, the child has experienced a considerable degree of hostility between the defendant and the plaintiff's parents. The plaintiff has to assume responsibility for these factors, and they militate against his having sole custody. They also militate against the plaintiff having joint legal custody, as he has requested, and the court relies on this factor as its explanation for why joint custody is denied.

The court is also taking into consideration the evaluation and testimony supplied by Tom Lanning, L.L.P. on the issue of custody.

Regarding parenting time, plaintiff shall have parenting time every other weekend from Friday evening to Sunday evening. He shall have the child two (2) evenings every week from 4:00 pm to 8:00 pm, every other week one of those evenings may be an overnight. The parties shall alternate traditional holidays and each party shall have parenting time four (4) weeks every summer in two (2) separate two (2) week periods. Plaintiff shall give defendant notice of the two week periods in which he will exercise such parenting time in the summer by May 15th of each year.

In making this custody decision the court is taking into consideration the fact borne out by the evidence that when either Austin or plaintiff's child by a prior relationship is with him, significant amounts of care for the child are provided by plaintiff's mother or parents rather than plaintiff himself. Plaintiff's former wife testified that the plaintiff admitted in a conversation with the Friend of the Court that his mother gave extensive care for the child of the first marriage.

This is not because plaintiff is unwilling to supply such attention to his children; however, the demands of his work have prevented it. In arriving at its conclusions regarding the involvement of plaintiff's parents in the tensions which arose in this marriage, the court is also taking into consideration evidence which shows that plaintiff's parents were instrumental in hiring a detective to follow defendant during the course of the divorce proceedings, with no evidence produced which was useful for the court in making its decisions. For whatever reason this may have been done, it increase[d] substantially the antagonism among the parties. Due to the parent's [sic] personal involvement in their son's child rearing, and the plaintiff's inability or unwillingness to take control of their involvement in his marriage, the defendant's relationship with her child would likely suffer irreparably if plaintiff had custody. The court is taking into consideration the fact that in her testimony regarding the issue of her involvement in the parties' marriage breakdown, the plaintiff's mother was not responsive and evasive.

Regarding child support, the evidence does show that the plaintiff earns approximately $47,000 per year. The defendant testified that she provides day care for two children and receives $110.00 per week, but that [she] does plan to increase her day care business. The court will impute day care to her at her rated capacity of four children, which means that she will earn $220 per week. Using these numbers, according to the 1998 Michigan Child Support Guidelines, and giving plaintiff credit for support which he pays for another child, support is set at $123.00 per week effective May 1, 1998.

PROPERTY

The bulk of the parties[’] property interest is contained in the home which they owned. Plaintiff brought this home into the marriage. Although plaintiff claimed that defendant made no contributions to the improvements in the home during the course of the marriage, the evidence is otherwise. In fact, defendant made contributions both before and during the marriage. The defendant, not only contributed money to the joint estate from child care, but also from craft shows which she conducted.

The home was appraised in 1991 by the plaintiff’s appraiser at $47,000. That appraisal was prepared at the request of the plaintiff’s parents when the plaintiff was engaged in his first divorce proceedings. The same appraiser testified at this trial and testified that as of 1997, the home was worth $50,000. Defendant’s expert, whom the court concludes is more persuasive, testified that today the home has a value of $68,000. The defen[dant’s] appraiser is the more credible of the two. Although plaintiff’s appraiser offered the opinion that the house was worth $50,000 in June 1997, at the time of trial, apparently after seeing defendant’s appraisal, he believed that the value was $57,000 - $58,000. This uncertainty has reflected on the credibility of the witness. Moreover, the court concludes that defendant’s expert considered more factors at arriving at his decision, had more extensive ongoing continuing education in the field, practiced in the field of appraisal longer than plaintiff’s expert and was more knowledgeable than plaintiff’s expert. Moreover, the comparable properties which he used in arriving at his decision were more similar in neighborhood and description than those selected by the plaintiff’s expert. In fact, plaintiff’s expert acknowledged that some of the comparables which he used to value the property were inappropriate. The court therefore concludes that his appraisal of $68,000 establishes the fair market value of the home. These are the only reliable figures the court has upon which to base its conclusions. Therefore, the home has increased in fair market value by $21,000 since 1991. Today the mortgage on the property is $35,000 leaving an equity of $33,000. At the date of marriage, the parties’ equity in the home was approximately $6,000 ($47,000 fair market value minus $41,000 mortgage balance at date of marriage). Therefore, during the marriage, the equity increased by some $27,000 ($33,000 equity presently minus $6,000 equity at the date of marriage). The evidence sustains a conclusion that both parties made contributions to the home. Plaintiff acknowledged they both made improvements to the house from their joint accounts, and that both

parties put money into their joint accounts during their marriage. From those joint accounts the parties paid utility bills and for improvements, such as a deck, hot tub, porch and fencing. It is clear from the testimony that the parties entered into the economics of their marriage in a joint fashion and both contributed what they could earn to the marriage and spent it on matters of joint interest and concern. Therefore, the increase in equity in the home should be available equally to the parties.

There is an issue as to a debt claimed to be due to the plaintiff's parents for money contributed to either buy or improve the home. The court concludes from the evidence that the plaintiff's parents were generous and entered into a tradition of "gifting" to their child and their child's spouses. Although the evidence sustains a conclusion that they belatedly attempted to recoup monies contributed by describing it as a "loan" when marital difficulties surfaced, the more reliable evidence is that the parents gave money outright to the plaintiff and his first wife . . . . It appears that plaintiff and his parents wanted it both ways; they wanted the money paid to the plaintiff for the purchase of the home to be considered a gift, so that no outstanding loans appeared when mortgage financing was sought; however, they also displayed an interest in receiving the money back at sometime. When faced with this contradictory evidence, the court is unable to conclude that this money was in fact a loan and therefore concludes that it was a gift. Any debts that may in fact be due to plaintiff's parents is not a matter of this marriage, but the obligation of the plaintiff.

The plaintiff has been living in the home for sometime and therefore the home is to become his property. He is to pay defendant $13,500 for her equity in the property. This is to be paid in equal installments over the period of 12 months at 7% on the unpaid balance. If after 12 months the debt is not paid, the house is to be sold and from the first proceeds received after the sale the balance due, plus accumulated interest from time to time until the debt is paid, is to be paid to the defendant with the balance paid to plaintiff.

Any pensions accumulated by the parties during the period of their marriage, or any increase in value in pensions accumulated by the parties during the period of their marriage shall be divided equally by a QDRO. Since the court has concluded that the break down [sic] in the marriage occurred in May of 1997, any pension evaluation for purposes of division shall be as of that date. Each party shall keep any motor vehicle that they are presently driving and they are responsible for any debts thereon. Plaintiff is responsible for the mortgage on the home. The defendant has taken money previous[ly] from an account of the parties when they separated. Therefore, the money remaining in a trust account, approximately $1,000, from the joint assets of the parties is to be retained by plaintiff.

Defendant testified that she is unable to maintain this action without financial support to pay an attorney. The evidence shows that there is substantial disparity in earning ability between the parties. The evidence also shows that the plaintiff has had substantial

> financial support in maintaining this litigation from his parents. Therefore, the court concludes that the plaintiff should pay $2,500 toward defendant's attorney fee which, according to her testimony was $13,500.

In late June of 1998, the trial court entered the judgment of divorce. Thereafter, plaintiff filed a delayed application for leave to appeal that this Court subsequently granted.

II. Standard Of Review

A. Established Custodial Environment

All custody orders must be affirmed on appeal unless the trial court's factual findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; MSA 25.312(8), *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J), 900 (Griffin, J); 526 NW2d 889 (1994); *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997). The great weight of the evidence standard applies to all findings of fact; a trial court's findings as to the existence of an established custodial environment and as to each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra,* 447 Mich 879, 900; *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), modified on other grounds 451 Mich 457; 547 NW2d 686 (1996). The abuse of discretion standard applies to the trial court's discretionary rulings; to whom custody is granted is such a discretionary dispositional ruling. *Fletcher, supra*, 447 Mich 879-880, 900. An abuse of discretion occurs when the result is so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *Fletcher, supra,* 447 Mich 879-880.

B. Limitations On Presentation Of Evidence

Under MRE 611, a trial court has broad power to control the mode and order of admitting proofs and interrogating witnesses. *Phillips v Mazda Motor Mfg (USA) Corp,* 204 Mich App 401, 415; 516 NW2d 502 (1994). The mode and order of interrogation is within the trial court's discretion." *Id.* at 415.

C. Attorney Fees

This Court will not reverse the trial court's decision to award or deny attorney fees in a divorce action absent an abuse of discretion. *Hawkins v Murphy,* 222 Mich App 664, 669; 565 NW2d 674 (1997); *Jansen v Jansen*, 205 Mich App 169, 173; 517 NW2d 275 (1994).

D. Child Support

A trial court's factual findings are to be reviewed for clear error. A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake was made. *Thames v Thames*, 191 Mich App 299, 301-302; 477 NW2d 496 (1991). An award of child support rests in the sound discretion of the trial court, and its exercise of discretion is presumed to be correct. *Morrison v Richerson,* 198 Mich App 202, 211; 497 NW2d 506 (1992). The party

appealing the support order has the burden of showing an abuse of discretion. *Thompson v Merritt*, 192 Mich App 412, 416; 481 NW2d 735 (1991).

E. Marital Home

On appeal, this Court must first review the trial court's findings of fact regarding the valuation of particular marital assets under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). "If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Id.* at 429-430; accord, *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

III. Established Custodial Environment

Plaintiff asserts that the trial court erred in determining that defendant had an established custodial environment with the parties' only child, Austin Grubb. We disagree.

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987). We conclude that the evidence does not clearly preponderate in the opposite direction from the trial court's finding that defendant had an established custodial environment with Austin Grubb. *Fletcher, supra*, 447 Mich 879, 900; *Ireland, supra*, 214 Mich App 242. The evidence presented at trial indicated that there was an appreciable time, especially following the June 1997 order awarding temporary custody of Austin Grubb to defendant, during which Austin Grubb looked to defendant alone for guidance, discipline, the necessities of life and parental comfort in a stable, settled atmosphere; in other words, an established custodial environment existed with defendant. *Baker, supra* at 579-580.

Additionally, after having conducted a thorough review of the record, we conclude that the trial court correctly determined that awarding defendant legal and primary physical custody of Austin Grubb was in the child's best interests. The trial court considered the best interest factors set forth in MCL 722.23; MSA 25.312(3). Our review reveals that the trial court's findings of fact with respect to each of the factors in question were not contrary to the great weight of the evidence, nor was its discretionary ruling regarding the ultimate custody decision an abuse of discretion. *Fletcher, supra*, 447 Mich 876-877, 900; *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998).

With respect to plaintiff's claim that the trial court did not go into any detail on any of the best interest factors, except factor (j), we find that the trial court's findings of fact were sufficient. MCR 2.517(A)(2). The trial court was not required to comment on every matter in evidence. *Fletcher, supra*, 447 Mich 883, 900.

IV. Limitations On Presentation Of Evidence

Plaintiff claims that, because of time limits placed on him at trial, he was unable to present all of the witnesses that he wanted to testify on his behalf and was unable to elicit all the pertinent testimony from the witnesses that he did present. However, plaintiff does not indicate which additional witnesses he would have called if given an opportunity, nor does he indicate what testimony he could have elicited from those witnesses or what additional testimony he could have elicited from the witnesses that did testify at trial that would have been favorable to his case. A party may not merely announce a position on appeal and leave it to the appellate court to discover and rationalize the basis for the claim. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Under these circumstances, there is simply no indication that the trial court abused its discretion in limiting the presentation of proofs below. *Phillips, supra,* 204 Mich App 415. We note that, during trial, plaintiff indicated that he only had two other witnesses to present. After those witnesses were presented, plaintiff did not attempt to present any other witnesses or claim that he had additional pertinent testimony to present to the court. These actions belie plaintiff's claim on appeal that he had additional witnesses and testimony to present.

V. Attorney Fees

We find no abuse of discretion in the trial court's decision to award defendant $2,500 in attorney fees. *Hawkins, supra,* 222 Mich App 669; *Jansen, supra,* 205 Mich App 173. The evidence presented at trial established that defendant was not in a position to fully pay her attorney fees. The evidence also indicated that there was a great disparity in the parties' incomes and that plaintiff had received financial assistance during the course of these proceedings from his parents. Under these circumstances, the evidence indicated that defendant required an award of attorney fees in order for her to defend this action and, contrary to plaintiff's claim, that plaintiff was in a position to pay some of defendant's attorney fees. Under these circumstances, an award of attorney fees was authorized. MCR 3.206(C)(2); *Hawkins, supra* at 669.

VI. Child Support

Plaintiff claims that the trial court's finding that he earned $47,000 per year was erroneous. We disagree. Although plaintiff testified that he earned $12.70 per hour, he admitted that, with overtime and incentives, he earned $47,000 in 1996. Plaintiff also testified that he still had the opportunity to earn overtime and incentives. Plaintiff did not introduce evidence to indicate that he earned less in 1997 or that he was earning less in 1998. Therefore, the trial court's finding that plaintiff earned $47,000 per year was not clearly erroneous. *Thames, supra,* 191 Mich App 301-302.

With regard to plaintiff's claim that the trial court erred in finding that defendant had imputed income of only $220 per week, we disagree. This finding was supported by defendant's testimony at trial that she had the capacity in her daycare for four children, in addition to her own two children, and that, at full capacity, she could earn $220 per week. Plaintiff argues that the trial court should have imputed income for six children instead of two because defendant's daycare license was for six children. However, defendant testified that, because she had two children of her own at home, she could only care for four other children under the terms of the license. This testimony was not contradicted by

plaintiff. We further find no clear error in the trial court's failure to impute income to defendant based on craft shows and garage sales she conducts inasmuch as it is eminently reasonable to regard such amounts as inconsequential.

VII. Marital Home

Plaintiff claims that the trial court erred in finding that defendant was entitled to $13,500 of the equity in the marital home. We disagree, for several reasons.

First, the evidence presented at trial supported the trial court's finding that defendant contributed to the increased equity in the marital home. As noted above, certain improvements were made to the marital residence during the marriage. Contrary to his position on appeal, plaintiff admitted at trial that defendant contributed financially to improving the house. Both parties acknowledged that they pooled their respective incomes into a joint account throughout the marriage, and the mortgage payments and residential improvements were made out of that account. Not only did defendant contribute to the improvements made to the residence during the marriage, she also contributed to some of the improvements made prior to the marriage. Moreover, during the marriage, the parties made extra mortgage payments out of their joint account in an effort to "pay the mortgage down." Clearly, the evidence indicated that defendant contributed to the increased equity in the marital home. The trial court's finding that she did make such a contribution, therefore, is not clearly erroneous. *Sparks*, *supra*, 440 Mich 151.

Secondly, the evidence supported the trial court's valuation of the marital residence. In 1989, plaintiff and his first wife purchased the marital home. The purchase price was $46,000. Plaintiff and his first wife were divorced in 1992. At that time, the house was valued at $47,000 and there was a mortgage balance of approximately $41,000. Hence, the equity in the marital home at the time of plaintiff's marriage to defendant in 1994 was approximately $6,000. After the divorce complaint was filed in this case in 1997, plaintiff's expert, Howard Vindedahl, appraised the residence at $50,000. However, in light of defendant's expert's appraisal of $68,000, at trial Vindedahl testified that he would appraise the property at around $57,000 or $58,000. Vindedahl acknowledged that his appraisal of the marital home was somewhat undervalued compared to the comparables used in his appraisal. He acknowledged that his comparables sold for as much as $48.00 per square foot while he appraised the subject property at only $31.00 per square foot. Moreover, Vindedahl admitted that a house just down the street from the marital residence with less square footage than the marital residence had just sold for $71,000.

Defendant's expert, Patrick Stanley, on the other hand, testified that he found "very good comps in the same age bracket . . . [with] [s]quare footages . . . within 10 percent" and all were within a half-mile of the marital home. Stanley indicated that the "comps" used by plaintiff's appraiser were not as reflective of the actual value of the home as the comparables that he used. According to Stanley, the property was worth $68,000.

In light of the above evidence, the trial court's valuation of the marital home at $68,000 was not clearly erroneous. The evidence supported this valuation. The trial court's finding in this regard was

based, in part, on its determination that defendant's expert was more credible than plaintiff's expert. Additionally, in light of the evidence presented below, it was not unfair or inequitable for the trial court to award defendant one-half of the increase in the equity of the marital home.

Affirmed.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[1] Plaintiff testified at trial that he had no plans to sell the house and that he expected to remain there for the foreseeable future.

[2] In fact, at the time of the transaction, plaintiff's parents signed a letter indicating that the money given to plaintiff and Clemens for the down payment on the house was intended to be a gift. Moreover, Clemens testified at trial that both of plaintiff's parents told her that the down payment money was a gift, not a loan.

[3] For example, the parties installed a deck, a side porch and siding.

[4] Certain improvements were also made to the house by plaintiff prior to his marriage to defendant. For instance, plaintiff installed a new furnace, water softener, and humidifier.